No. 87-1629

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NATIONAL CAN CORPORATION, et al.,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF REVENUE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

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Appellee, State of Washington, Department of Revenue, moves this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Washington State Supreme Court on the ground that the questions presented are so unsubstantial as to require no further argument.[1]

JURISDICTION

National Can Corporation (NCC) is not entitled to appeal the Washington Supreme Court's decision in *Na-*

[1]This action is not subject to review by appeal pursuant to 28 U.S.C. § 1257(2). See Jurisdiction, *infra.*, p. 1. If this action is treated as a petition for writ of certiorari, the State respectfully requests that this Court deny the petition.

tional Can Corporation v. Department of Revenue, 109 Wn.2d 878, 749 P.2d 1286 (1988) pursuant to 28 U.S.C. § 1257(2).[2] In *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. __, 107 S.Ct. 2810 (1987) this Court invalidated Washington's multiple activities exemption, Wash. Rev. Code § 82.04.440. Contrary to NCC's assertion (J.S. 2), on remand the Washington Supreme Court did not sustain the validity of that statute against challenge under the U.S. Constitution, as required by 28 U.S.C. § 1257(2). Instead, the court ruled that *Tyler Pipe* should not be applied retroactively.

The Washington Supreme Court's decision relates "to the appropriate scope of federal equitable remedies, a problem arising from the enforcement of a state statute during the period before it had been declared unconstitutional." *Lemon v. Kurtzman*, 411 U.S. 192, 199 (1973) (*Lemon II*). Thus, NCC is entitled to seek review only pursuant to a petition for writ of certiorari under 28 U.S.C. § 1257(3). NCC's Jurisdictional Statement should be considered as such a petition pursuant to 28 U.S.C. § 2103.

STATEMENT OF THE CASE

In *Tyler Pipe*, 107 S.Ct. 2810, 2823 (1987) this Court held "Washington's multitple activities exemption invalid because it places a tax burden upon manufacturers in Washington engaged in interstate commerce from which local manufacturers selling locally are exempt." This Court remanded the case to the Washington Supreme Court to determine the appropriate remedy.

Tyler Pipe was handed down on June 23, 1987. Less than two months later, on August 10, 1987, the Washington legislature met in special session to respond to the decision. Following this Court's lead, the legislature re-

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[2]Tyler Pipe Industries, Inc. also seeks review of *National Can* by this Court. See *Tyler Pipe Industries, Inc. v. State of Washington Department of Revenue*, U.S. Supreme Court Docket No. 87-1767.

pealed the multiple activities exemption and substituted a new system of credits.[3] Under the new law a Washington manufacturer may take a credit against its Washington manufacturing tax for selling gross receipts taxes paid to another state, local or foreign jurisdiction. Similarly, an out-of-state manufacturer may take a credit against its Washington selling tax for manufacturing gross receipts taxes paid to another state, local or foreign jurisdiction. Laws 1987, 2nd ex. sess., ch. 3. App. A. These credits eliminate any possibility of a multiple burden as a result of duplicate taxes imposed by another jurisdiction.

NCC disagrees with this Court that these credits "presumably cure the discrimination."[4] 107 S.Ct. 2821. In the proceeding before the Washington Supreme Court on remand, NCC submitted an offer of proof to the effect that few jurisdictions have selling or manufacturing gross receipts taxes and that most interstate taxpayers are not subject to such taxes. Brief of Appellant Xerox Corporation on Remand From the Supreme Court of the United States at A-1, *National Can*. This assertion is important in this case because it constitutes an admission that NCC has not been subjected to an actual multitple tax burden as a result of the invalid multiple activities exemption.

On remand the Washington court ruled that this Court's decision in *Tyler Pipe* does not apply retroactive-

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[3]As this Court stated in *Tyler Pipe* "an expansion of the multiple-activities exemption to provide out-of-state manufacturers with a credit for manufacturing taxes paid to other States would presumably cure the discrimination." 107 S.Ct. at 2821. This Court also stated that the "parallel condition precedent for a valid multiple activities exemption * * * would provide a credit against Washington tax liability for wholesale taxes paid by local manufacturers to any State, not just Washington." 107 S.Ct. at 2819-20.

[4]Approximately 80 taxpayers are presently challenging the constitutionality of the newly enacted credits in *American National Can Corporation, et al. v. Department of Revenue, State of Washington, et al.*, Thurston County Cause No. 88-2-00680-3.

ly.[5] The court denied claims for refund before June 23, 1987, the date of this Court's decision in *Tyler Pipe. National Can*, 109 Wn.2d 878, 895 (1988). J.S. 18a. NCC now seeks review of this decision.

SUMMARY OF ARGUMENT

1. NCC asks this Court to accept review of the decision below on two grounds. First, the Washington Supreme Court is said to have distorted and reshaped the factors identified by this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) for determining when a decision of this Court should be given only prospective application. J.S. (i), 6, 10 and 15. Second, and apparently without regard to whether the *Chevron* factors were correctly applied, NCC contends that giving only prospective application to this Court's decision in *Tyler Pipe*, 107 S.Ct. 2810 (1987) would do unprecedented and unacceptable violence to the mandates of Article III § 2 and the Commerce Clause of the U.S. Constitution.[6] J.S.(i), 5-6, 7-9 and 16-17. In this regard, NCC appears to argue that the interests protected by the Commerce Clause mandate that no decision invalidating some feature of a state's taxing statute can ever be given only prospective application, if future discrimination by states is to be avoided.

2. However, the court below correctly adhered to the three *Chevron* factors. The tests themselves and their proper application sufficiently accommodate the Commerce Clause interest of discouraging future discrimina-

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[5]On remand there were three potential questions before the Washington Supreme Court. The first was whether *Tyler Pipe* should be applied retroactively. The second question had to do with the scope of refunds if *Tyler Pipe* was applied retroactively. The credit enacted by the legislature could, by its terms, be applied retroactively. See App. A. The legislature sought to cure past discrimination by supplying the missing credits. The third question was one of severability of the entire multiple activities exemption in the event the new credit should be found invalid. Since the court ruled that *Tyler Pipe* was not retroactive, it did not reach the second or third question.

[6]NCC first discusses the Article III question and then the *Chevron* question. We reverse that order.

tion against interstate business. The Commerce Clause does not peculiarly require that such litigants always be given retrospective relief when the *Chevron* tests for giving a decision only prospective application are otherwise satisfied. The fact that appellants, as the litigants in *Tyler Pipe*, will be given prospective relief only, and not both retroactive and prospective relief, is not unprecedented. The result is consistent with what this Court has done in other cases, and raises no issue of the existence of a case or controversy within the meaning of Article III. This case presents no substantial federal question for this Court's consideration.

3. NCC's argument that the court below has reshaped the *Chevron* factors in an unacceptable manner focuses exclusively on the first *Chevron* factor, that "the decision to be applied nonretroactively must establish a new principle of law." 404 U.S. at 106. This assertion both misconstrues *Chevron* and misrepresents the court's opinion in *National Can*, 109 Wn.2d 878 (1988). The argument misconstrues *Chevron* because this Court held that a new principle of law is established by "overruling clear past precedent on which litigants may have relied * * * *" 404 U.S. at 106. NCC simply ignores this test. The argument misrepresents *National Can* because the Washington Supreme Court focused its analysis primarily on "the long line of cases upholding the Washington B&O tax, [and] the fact that *Tyler* [*Pipe*] overruled past precedent on which the states may have relied * * * *" 109 Wn.2d at 882. Far from reshaping the first factor, the Washington Supreme Court carefully followed the line drawn by this Court in *Chevron*.

The Washington Supreme Court was equally careful in evaluating the second and third *Chevron* factors — purpose and inequity. The free trade purpose of the Commerce Clause would not be retarded by only prospective application of *Tyler Pipe* because whatever chill was imposed on interstate trade is in the past. It would also be inequitable to require the State to make refunds given its

reasonable reliance on past precedent. This case involves substantial sums. Refunds sought by the litigants exceed $56 million and for the period 1980 through 1984 the State estimates refunds in excess of $432 million.

——4. The court's conclusions with regard to the second and third *Chevron* factors are strengthened by the unique circumstances in this case. *Tyler Pipe* invalidated the multiple activities exemption because of the risk of multiple burden, stemming from the fact that the exemption took into account only Washington's taxes, not similar taxes in another jurisdiction. However, NCC contends that few other jurisdictions have similar taxes and that, in general, interstate taxpayers were not subject to an actual multiple burden. Thus, precisely because the discrimination and multiple burdens are more hypothetical than real, it is difficult to imagine that free trade among the states was ever actually chilled in this case.

Similarly, the substantial harm to the State from making massive refunds must be balanced against the fact that NCC suffered virtually no harm. Indeed, any refund to NCC would constitute a pure windfall. For if the multiple activities exemption had taken into account, in the first place, another jurisdiction's similar taxes, NCC would have had to pay without question the taxes for which it now seeks a refund.

5. NCC further argues that there should never be only prospective application in a Commerce Clause case — even if the *Chevron* factors support it. NCC contends that prospective application will simply encourage states to pass discriminatory tax laws and then seek prospective application of adverse decisions. This argument ignores the three *Chevron* factors, particularly the first one. There must be a new principle of law established, and this is a threshold requirement. Washington met this threshold requirement because its tax system remained virtually unchanged since 1950, and the constitutionality of the system was sustained on numerous occasions by both the Washington Supreme Court and this Court. Thus, *Na-*

tional Can provides no incentive for states to discriminate intentionally against interstate commerce.

6. NCC also contends that this Court is without power under Article III to apply its decisions only prospectively to the litigants before it. This contention is contrary to the decisions of this Court. In both *Lemon v. Kurtzman*, 411 U.S. 192 (1973) (*Lemon II*) and *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983), this Court refused to apply its decisions rertroactively to the successful litigants before it. However, in both decisions this Court applied its decision prospectively to those litigants. *National Can* is consistent with *Lemon II* and *Norris*. In *National Can* the court refused to apply *Tyler Pipe* retroactively to NCC. However, *Tyler Pipe* does apply prospectively. After *Tyler Pipe* the State had the choice of foregoing future collection of taxes from appellants or amending its laws to conform to this Court's decision.

Article III does not require a taxpayer to receive retroactive relief. This Court has held that it has jurisdiction to hear tax cases under Article III even when the plaintiff is not seeking a tax refund. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 320 n.3 (1977) and *Nashville, Chattanooga and St. Louis Railway v. Wallace*, 288 U.S. 249, 263-65 (1932).

ARGUMENT

THIS CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION AND THE DECISION BELOW IS CORRECT

The decision below is correct and the case does not present important questions of law that must be resolved

by this Court.[7] Reversing the order used by NCC, we begin with the question regarding the *Chevron* factors. We then address the Article III question.

I. THE WASHINGTON SUPREME COURT CORRECTLY APPLIED THE CHEVRON FACTORS IN DECIDING NOT TO APPLY TYLER PIPE RETROACTIVELY.

In *Chevron*, 404 U.S. 97, 106-7 (1971) this Court set out three factors for determining whether the decision in a civil proceeding should be applied prospectively or retroactively. These three factors may be referred to as reliance, purpose and inequity. In *National Can*, 109 Wn.2d 878 (1988) the Washington Supreme Court carefully evaluated each factor in deciding not to apply *Tyler Pipe*, 107 S.Ct. 2810 (1987) retroactively. The decision below is correct.

In addition, whether *Tyler Pipe* should be applied retroactively is not a substantial federal question. NCC tries to breathe significance into the question by charging that the Washington Supreme Court has reshaped the *Chevron* factors. J.S. 6 and 10. This charge is unfounded. NCC's argument simply ignores the substantive analysis of the court in *National Can*. We will demonstrate this point by reviewing, in turn, each of the three *Chevron* factors and the manner in which they were applied below.

A. The Reliance Factor—Tyler Pipe Established a New Principle of Law by Overruling Past Precedent on Which the State Had Justifiably Relied.

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[7] If NCC's Jurisdictional Statement is regarded—as it should be—as a petition for writ of certiorari pursuant to 28 U.S.C. § 2103, the writ should not issue. This case fails to meet the considerations outlined in Rule 17.1 of the Rules of the Supreme Court of the United States. NCC alleges no conflict between the decision below and the decision of any other state or federal court or any decision of this Court. In addition, the Washington Supreme Court did not decide an important question of law which has not been, but should be, settled by this Court.

1. A new principle of law is established when this Court overrules past precedent.

The first factor is reliance. To be applied prospectively only a decision

> must *establish a new principle of law, either by overruling clear past precedent on which litigants may have relied*, see, e.g., *Hanover Shoe v. United Shoe Machinery Corp.*, supra, at 496, or by deciding an issue of first impression whose resolution was not clearly foreshadowed * * * *

Chevron, 404 U.S. at 106 (citations omitted, emphasis added).

NCC argues that a new principle of law must constitute a sharp break from prior precedent. J.S. 12. We agree. However, NCC completely ignores the question of how to tell when a sharp break occurs. *Chevron* and *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 496 (1968), which is cited in *Chevron*, both stand for the proposition that a new principle of law is established when this Court unmistakably overrules clear past precedent. The precedent overruled may be precedent of this Court or of other appellate courts. *Chevron*, 404 U.S. at 107 and *Saint Francis College v. Al-Khazraji*, 481 U.S. ___, 107 S.Ct. 2022, 2025-26 (1987).

2. Prior to Tyler Pipe Washington's tax was repeatedly sustained; and compensating taxes were sustained despite the risk of multiple burdens.

To determine whether a decision of this Court establishes a new principle of law, it is necessary to review the law as it existed prior to the decision. NCC simply ignores the past precedent of this Court, and treats *Tyler Pipe* as a case of first impression, which it certainly is not. Two aspects of the law prior to *Tyler Pipe* are important in this case.

First, prior to *Tyler Pipe* Washington's business and occupation (B&O) tax was repeatedly sustained against

constitutional challenge. The B&O tax at issue in *Tyler Pipe*, including the multiple activities exemption, had remained essentially unchanged since 1950. As this Court noted in *Tyler Pipe*, 107 S.Ct. 2015 n.9, the constitutionality of this system had been challenged on several occasions and had always been sustained; sustained by the Washington Supreme Court and Court of Appeals and sustained by this Court. See *B. F. Goodrich v. State*, 38 Wn.2d 663, 668, 231 P.2d 325 (1951), cert denied 342 U.S. 876 (1951); *Crown Zellerbach Corp. v. State*, 45 Wn.2d 749, 759, 278 P.2d 305 (1954); *General Motors Corp. v. State*, 60 Wn.2d 862, 876, 376 P.2d 843 (1962), aff'd 377 U.S. 436, 449 (1964); *Standard Pressed Steel Co. v. Department of Revenue of Washington*, 10 Wn.App. 45, 52, 516 P.2d 1043 (1973), aff'd 419 U.S. 560, 563 (1975); and *Chicago Bridge & Iron Co. v. Washington Department of Revenue*, 98 Wn.2d 814, 830, 659 P.2d 463 (1983), appeal dismissed for want of a substantial federal question, 464 U.S. 1013 (1983). Thus, until this Court's decision in *Tyler Pipe* Washington's B&O tax was imposed with the full approval of the courts.

Second, prior to *Tyler Pipe* this Court sustained compensating taxes—such as the use tax—despite the possibility of a multiple burden. This Court has long been aware that a compensating tax may result in a multiple burden. The possibility of a multiple burden exists if one state imposes a use tax on goods without allowing a credit for taxes paid, on the same goods, to another state. Without the credit the same goods are potentially subject to both a sales tax and a use tax. In such a case the risk of a multiple burden is obvious.

Despite this possibility, this Court refused to invalidate a use tax, on the grounds of a potential multiple burden, until "a taxpayer paying in the state of origin is compelled to pay again in the state of destination." *Henneford v. Silas Mason Co.*, 300 U.S. 577, 587 (1937); *Southern Pacific Co. v. Gallagher*, 306 U.S. 167, 172 (1939); and *Williams v. Vermont*, 472 U.S. 14, 21-2 (1985).

This Court applied the same rule in sustaining the Washington B&O tax in *General Motors*, 377 U.S. at 448-49 and *Standard Pressed Steel*, 419 U.S. at 563. This Court has consistently required taxpayers subject to compensating taxes to prove they were subject to an actual multiple burden. Until *Tyler Pipe* the mere risk of such burden was not enough.

3. The Washington Supreme Court found that Tyler Pipe had established a new principle of law because this Court had overruled past precedent.

In *National Can*, 109 Wn.2d at 882-88 J.S. 4a-11a the Washington Supreme Court concluded that *Tyler Pipe* had established a new principle of law because this Court had overruled past precedent. The court below placed primary reliance on "the long line of cases upholding the Washington B&O tax, [and] the fact that *Tyler [Pipe]* overruled past precedent on which the states may have relied." 109 Wn.2d at 882. In *Tyler Pipe* this Court overruled its decisions which had sustained compensating taxes despite the risk of multiple burden and its decisions which had sustained the Washington tax system at issue. This Court also overruled decisions of the Washington Supreme Court sustaining this State's tax system.

NCC clearly disregards this Court's decision in *Chevron* on this point. NCC refuses to acknowledge that a new principle of law is established when this Court overrules clear past precedent. NCC argues that the Washington Supreme Court reshaped the first factor into some sort of subjective test. J.S. 6 and 15. This argument distorts the court's analysis. The Washington Supreme Court found a new principle of law had been established because past precedent had been overruled. The best way to demonstrate this is to quote the court directly:

> Commerce Clause challenges to the multiple activities exemption alleging discrimination against interstate commerce have many times been rejected by

this court. See *B. F. Goodrich Co. v. State*, 38 Wn.2d 663, 231 P.2d 325, cert. denied, 342 U.S. 876 (1951); *Crown Zellerbach Corp. v. State*, 45 Wn.2d 749, 278 P.2d 305 (1954); *General Motors Corp. v. State*, 60 Wn.2d 862, 376 P.2d 843 (1962), aff'd 377 U.S. 436 (1964); *Chicago Bridge & Iron Co. v. Department of Rev.*, 98 Wn.2d 814, 659 P.2d 463, appeal dismissed, 464 U.S. 1013 (1983). This court was clear in our *National Can* [105 Wn.2d 318 (1986)] decision that because the West Virginia and Washington taxes differed significantly, we were relying on the

> long history of the United States Supreme Court's treatment of this state's gross receipts tax as having withstood commerce clause challenges, see *Department of Rev. v. Association of Wash. Stevedoring Cos.*, 435 U.S. 734, 55 L.Ed.2d 682, 98 S.Ct. 1388 (1978); *Standard Pressed Steel Co. v. Department of Rev.*, 419 U.S. 560, 42 L.Ed.2d 719, 95 S.Ct. 706 (1975); *General Motors Co. v. Washington*, 377 U.S. 436, 12 L.Ed.2d 430, 84 S.Ct.. 1564 (1964) * * * *National Can*, [105 Wn.2d] at 339-40.

* * *

Also supporting the view that *Tyler* announced new law is Justice Scalia's dissent, which states that the *Tyler* decision "has no basis in the Constitution, and is not required by our past decisions" and that to apply the internal consistency rule, the "Court is compelled to overrule a rather lengthy list of prior decisions." *Tyler*, 107 S.Ct. at 2824 (Scalia, J., dissenting).

109 Wn.2d at 885-86. The words of the Washington Supreme Court refute NCC's claim that the court reshaped the first factor.

Significantly, NCC does not disagree that past precedent has been overruled. NCC's only real argument is that the overruling was not accomplished in *Tyler Pipe*. Thus, NCC's complaint is reduced to a disagreement about when prior precedent was overruled—not about some reshaping of the first factor itself. This complaint does not give rise to a substantial federal question. The Washington Supreme Court is correct—*Tyler Pipe* is the case that overruled past precedent.

4. Tyler Pipe—Not Armco—overruled past precedent in holding the multiple activities exemption invalid because of the risk of multiple burden.

This Court's discussion of the discrimination issue in *Tyler Pipe* is contained in Part III of the opinion. 107 S.Ct. 2816-20. There are two parts to this Court's analysis. First, this Court considered the structure and consequences of the multiple activities exemption. 107 S.Ct. 2816-7. This Court relied on *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984) to establish that the manufacturing B&O tax was facially discriminatory. Second, this Court considered the State's argument that the manufacturing tax was valid as a compensating tax, despite the apparent facial discrimination. 107 S.Ct. at 2817-20. This Court concluded that the manufacturing B&O tax was not valid as a compensating tax because the multiple activities exemption held the potential for a discriminatory multiple burden. This Court's holding with regard to compensating taxes overrules past precedent. We begin our discussion with that holding.

(a) Tyler Pipe overruled past precedent by holding the multiple activities exemption discriminatory, without proof of an actual multiple burden.

The manufacturing B&O tax appears discriminatory because it is imposed primarily on interstate commerce. However, a tax that appears discriminatory does not discriminate against interstate commerce, if it is a valid compensating tax. The use taxes sustained in *Silas Mason*, 300 U.S. 577 (1937) and *Southern Pacific*, 306 U.S.. 167 (1939) also appeared facially discriminatory because they were imposed solely on goods from out of state.

In *Tyler Pipe* this Court ruled that the manufacturing tax was not valid as a compensating tax because the benefits of the multiple activities exemption did not ex-

tend to another state's taxes. This Court said that the multiple activities exemption eliminates "the risk of multiple taxation when the acts of manufacturing and wholesaling are both carried on within the State. The exemption excludes similarly situated manufacturers and wholesalers which conduct one of those activities within Washington and the other activity outside the State." 107 S.Ct. at 2820. To have a valid multiple activities exemption this Court said it would be necessary for the State to provide "a credit against Washington tax liability for wholesale taxes paid by local manufacturers to any State, not just Washington." 107 S.Ct. 2819-20.

Thus, this Court ruled that the manufacturing tax was not valid as a compensating tax, because of the risk of multiple burden caused by the failure of the multiple activities exemption to take into account the taxes of other states. *Tyler Pipe* rests entirely on the *risk* of multiple burden. NCC never proved or even claimed it was actually subject to a gross receipts tax on manufacturing or selling imposed by another state. Indeed, NCC now claims that it does not pay such taxes because few other jurisidctions impose them. Brief of Appellant Xerox Corporation on Remand From the Supreme Court of the United States at A-1, *National Can*.

Tyler Pipe overruled past precedent in two respects. First, of course, it overruled prior decisions in Washington and of this Court sustaining the very tax system at issue in *Tyler Pipe*. See Section I(A)(2), *supra*., p. 9-10. The majority specifically overruled *General Motors*, 377 U.S. 436 (1964) to the extent it was inconsistent. 107 S.Ct. at 2820. Second, *Tyler Pipe* overruled this Court's prior decisions sustaining compensating taxes, despite the risk of multiple burden caused by the failure to allow a credit for taxes paid to another state. 107 S.Ct. at 2824 (Scalia, J., dissenting). See Section I(A)(2), *supra*., p. 10.

(b) In Tyler Pipe this Court invoked Armco merely as a prelude to its discussion of the compensating tax issue.

NCC argues that *Tyler Pipe* did not overrule past precedent owing to this Court's reliance on *Armco*. J.S. 13-14. In fact, this Court invoked *Armco* only to set the stage for its discussion of the compensating tax issue. This Court began by noting that the multiple activities exemption "has the same facially discriminatory consequences as the West Virginia exemption * * * invalidated in *Armco*." 107 S.Ct. at 2816. This Court went on to say that its reliance in *Armco* on Justice Goldberg's dissent in *General Motors*, 377 U.S. 459-60 dooms the State's effort to distinguish "between an exemption from a wholesaling tax — as was present in *Armco* — and the exemption from a manufacturing tax" in *Tyler Piper*. 107 S.Ct. at 2817. Thus, the taxes in both Washington and West Virginia appeared facially discriminatory. Washington's manufacturing tax would therefore be invalid *unless* it was a valid compensating tax.

As we have shown, *Armco* is not the overruling case. Only after *Tyler Pipe* does a valid compensating tax now require a credit for taxes paid to other states. 107 S.Ct. at 2819. However, after *Armco* no such credit was required. In *Williams v. Vermont*, 472 U.S. 14, 22 (1985), which was decided one term after *Armco*, this Court again refused to strike down a use tax owing to the risk of multiple burden caused by the failure to allow a credit for taxes paid to another state.[5] See *Tyler Pipe*, 107 S.Ct. at 2824 (Scalia, J., dissenting).

To be sure, in *Armco* West Virginia argued that its wholesaling tax was valid as a compensating tax. This Court rejected the argument, however, because of differ-

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[5] In *Williams* this Court did subsequently invalidate the use tax because it violated the Equal Protection Clause. 472 U.S. at 27.

ences in the rate and measure of West Virginia's wholesaling and manufacturing taxes. According to this Court, these differences "[make] clear that the manufacturing tax is just that, and not in part a proxy for the gross receipts tax" on selling. 467 U.S. at 643. In contrast, this Court in *Tyler Pipe* recognized that the rate and measure of Washington's selling and manufacturing B&O taxes were essentially the same. 107 S.Ct. at 2813. This Court focused instead on the failure of the multiple activities exemption to encompass another state's gross receipts taxes. In so doing *Tyler Pipe* overruled critical past precedent.

NCC makes much of a memorandum from the Director of Revenue to the Governor of the State of Washington dated June 14, 1984 (Exhibit 32). J.S. at 4 and 14. The memorandum expresses concern about the impact of *Armco* on Washington. NCC argues that this memorandum establishes that the State did not rely on prior precedent. J.S. 14. We suggest that a preliminary analysis of *Armco*, issued two days after the decision was handed down, is not a definitive statement about the State's reliance. Ultimately, the existence of a new principle of law is a question of law to be determined by the courts. Accordingly, this memorandum is irrelevant.

B. The Purpose Factor — The Purpose of the Commerce Clause Would not be Impaired by Prospective Application of Tyler Pipe.

The second factor is purpose. The test is "whether retrospective operation will further or retard" the operation of the new rule. *Chevron*, 404 U.S. at 107. In *National Can*, 109 Wn.2d at 888-90 (J.S. 11a-13a) the Washington Supreme Court determined that purely prospective application of *Tyler Pipe* would not retard the Commerce Clause purpose of promoting an area of free trade among the states. The court concluded that "whatever chill was imposed on interstate trade is in the past." 109 Wn.2d at

888. J.S. 11a. Indeed, it is difficult to imagine that free trade among the states was actually chilled in this case. NCC contends that few other jurisdictions have similar taxes. Thus, the risk of multiple burden present in the multiple activities exemption "was not in fact an actual double burden for most of these litigants." 109 Wn.2d at 889. J.S. 12a.

Retroactive application of *Tyler Pipe* would actually frustrate the Commerce Clause policy that interstate commerce should pay its fair share of the cost of state government by creating "a window of tax-free time for taxpayers involved in interstate commerce to the detriment of all other taxpayers." 109 Wn2d at 890. J.S. 12a. The court thus recognized that the refunds demanded by NCC would constitute a windfall. For if the multiple activities exemption had encompassed another state's taxes in the first place, NCC would have been entitled to no refunds whatsoever.

In discussing the purpose factor NCC abandons its claim that the Washington Supreme Court "reshaped" the *Chevron* factors. J.S. 6. NCC does not dispute the court's evaluation of the purpose of the Commerce Clause or its analysis of the purpose factor. Instead, NCC contends that any prospective application in a Commerce Clause case will encourage future discrimination. J.S. 16. Thus, NCC argues that there should be no prospective application—even if all three of the *Chevron* factors are satisfied. NCC advances two reasons to support its argument.

First, NCC asserts that any prospective application will encourage discrimination. This contention ignores the three *Chevron* factors. The first factor, reliance, constitutes the critical threshold. A party cannot obtain prospective application unless this Court establishes a new principle of law. Here, *Tyler Pipe* established a new principle of law by overruling past precedent.

As part of its argument, NCC criticizes Washington's prior conduct of turning its tax system "inside out" after a

portion of the system was invalidated in *Columbia Steel Co. v. State*, 30 Wn.2d 658, 192 P.2d 976 (1948). J.S. 16. Of course, NCC neglects to mention that the new tax system, enacted in 1950, was subsequently challenged and sustained by the Washington Supreme Court and this Court. See Section I(A)(2), *supra.*, p. 9-10. Thus, *National Can* is not an open invitation for states to pass unconstitutional tax statutes and then seek prospective only application of adverse decisions.

NCC's second argument contends that giving *Tyler Pipe* only prospective application — even if all three *Chevron* factors are met — will discourage litigation. J.S. 17. This fear is unfounded.[7] Application of judicial decisions on a purely prospective basis has been a possibility recognized by this Court since at least 1932 when this Court approved the practice in *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932). Despite this possibility, there has been no appreciable drop in litigation at either the state or federal level. As the court observed in *National Can*, "taxpayers always have the incentive to challenge potentially unconstitutional tax statutes to avoid future tax liability." 109 Wn.2d at 890. J.S. 13a.

C. The Inequity Factor — It Would be Inequitable to Apply Tyler Pipe Retroactively and Require Refunds in this Case.

The third factor is inequity. The test is whether retroactive application of the court's decision will "produce substantial inequitable results." *Chevron*, 404 U.S. at 107. In *National Can*, 109 Wn.2d 890-92 (J.S. 13a-16a) the Washington Supreme Court concluded that

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[7] A number of commentators concur that the fear of drying up litigation is overblown. Auerbach, Garrison, Hurst & Mermin, *The Legal Process*, 176-77 (1961); Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 Hastings L. J. 533, 546-47 (1977); and Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 Va. L. Rev. 1557, 1613-14 (1975).

retroactive application of *Tyler Pipe* would be inequitable because "[r]efunds sought in these cases alone exceed $56 million and the State estimates refunds from 1980 through 1984 could be in excess of $423 million." 109 Wn.2d at 892. J.S. 15a. The court also emphasized that the State's "reliance was justified by the presumptive validity of the tax statute and the case law upholding that statute." 109 Wn.2d at 892. J.S. 15a-16a.

Once again, the Washington Supreme Court did not "reshape" the inequity factor. The court's analysis is virtually identical to the analysis of this Court in *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983). In *Norris* this Court was concerned about the cost to the state if the decision was applied retroactively. As stated by Justice Powell:

> Imposing such unanticipated financial burdens would come at a time when many States and local governments are struggling to meet substantial fiscal deficits. Income, excise, and property taxes are being increased. There is no justification for this Court * * * to impose this magnitude of burden retroactively on the public. Accordingly, liability should be prospective only.

463 U.S. at 1106-7.

NCC, itself, tries to reshape this factor by arguing that it is ability to pay rather than hardship that governs inequity. J.S. 18 n.28. As Justice Powell states in *Norris*, the question is hardship. The State should not be put to the hardship of raising taxes or slashing programs to pay refunds.

It is again important to remember that the taxpayers in this case suffered no actual harm from the now invalid multiple activities exemption. This Court invalidated the exemption because it did not accommodate the risk of multiple burden for taxpayers potentially subject to taxes of other states.

NCC also argues, incorrectly, that the State created its own hardship by collecting the revenue. J.S. 18. Prior

to December 31, 1984, when the bulk of the actions consolidated in this case were filed, NCC and the other appellants did not even seek relief. Afterwards, the State continued to collect the tax because the trial court and the Washington Supreme Court ruled that the multiple activities exemption was valid, relying on past precedent.

II. NATIONAL CAN DOES NOT RENDER THIS COURT'S OPINION IN TYLER PIPE ADVISORY, FOR TYLER PIPE APPLIES PROSPECTIVELY TO NCC.

National Can, 109 Wn.2d 878 (1988) held that *Tyler Pipe*, 107 S.Ct. 2810 (1987) does not apply retroactively. From this NCC argues that the Washington Supreme Court rendered *Tyler Pipe* an advisory opinion in violation of Article III, § 2 of the U.S. Constitution. J.S. 5-6 and 7-10. This is not a significant question. Indeed, NCC itself recognized in the proceeding below that this case presents no significant Article III question. Although NCC now claims this question is substantial, its discussion of Article III was limited to a single paragraph at the end of one of its briefs in the proceeding below. See Brief of Appellant Xerox Corporation on Remand From the Supreme Court of the United States at 47-8, *National Can*. The Washington Supreme Court did not even pass upon this question.[10]

NCC's Article III argument is incorrect for two reasons. First, this Court has the power to apply its decisions only prospectively to the litigants before it. Second, *Tyler*

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[10]Nor did the court pass on a Supremacy Clause question, since NCC did not raise the issue below. NCC's Supremacy Clause argument here is at best unclear but appears premised on a contention that this Court would never permit a lower court to give only prospective application to one of its decisions. J.S. 7. In this sense, NCC's argument may be suggesting that the Supremacy Clause imposes upon the State Supreme Court the same requirements that Article III imposes upon this Court. Yet, as we will see, *infra*., p. 21-23, Article III can thus hardly impose, via the Supremacy Clause, such a requirement on the State Supreme Court.

Pipe is not advisory, for it prospectively determines the rights and obligations of the parties in this case.

A. This Court Has the Power to Apply its Decisions Only Prospectively to the Litigants Before it.

NCC contends that the Washington Supreme Court's decision is "unprecedented and offensive to the mandate * * * of Article III." J.S. 5. Essentially, NCC argues that under Article III this Court is without power to apply its decisions only prospectively to the litigants before it in a civil proceeding, or to put it another way, that the litigants must *always* be granted retroactive relief.

NCC's contention is contrary to the decisions of this Court. In both *Lemon v. Kurtzman*, 411 U.S. 192 (1973) (*Lemon II*) and *Norris*, 463 U.S. 1073 (1983), this Court refused to apply its decisions retroactively to the successful litigants before it.[11]

Lemon II came after *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (*Lemon I*) in which this Court struck down a law allowing the state to reimburse nonpublic sectarian schools for certain services and remanded to the three judge district court for further proceedings. The district court applied *Lemon I* only prospectively, enjoining future payments under the invalid law but allowing payments for services performed prior to *Lemon I*. 411 U.S. at 194. In *Lemon II* this Court affirmed the district court decision.

In *Norris* this Court ruled that Title VII of the Civil Rights Act of 1964 prohibits an employer from offering an

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[11] *Simpson v. Union Oil Co.*, 396 U.S. 13 (1969) (*Simpson II*), cited by NCC, is not to the contrary. In *Simpson II* this Court merely held that the prospective application question reserved in its prior opinion, *Simpson v. Union Oil Co.* 377 U.S. 13, 24-5 (1964), applied to litigants other than those before this Court. In *Tyler Pipe* this Court specifically remanded so the Washington Supreme Court could decide the question of prospective application with regard to NCC. 107 S.Ct. at 2822. We also note that *Simpson II* termed prospective application "most unusual" when "the rule announced was not innovative." 396 U.S. at 14. Of course, in this case the new rule is "innovative" for *Tyler Pipe* established a new principle of law by overruling past precedent.

annuity plan which uses sex based tables for calculating benefits. However, again, this Court ruled that the decision only applies to benefits derived from contributions collected after the effective date of *Norris*. 463 U.S. at 1111 (O'Connor, J., concurring).

Clearly NCC is incorrect in its assertion that this Court lacks the power to apply its decisions only prospectively to the litigants before it. Indeed, if the federal district court in *Lemon II* can refuse to apply this Court's civil decisions retroactively, the Washington Supreme Court does not violate Article III if it makes a similar decision.

B. National Can Applies This Court's Opinion in Tyler Pipe Prospectively to NCC.

National Can does not render *Tyler Pipe* advisory. NCC's entire argument on this point rests on a misrepresentation of the decision below. NCC states that the Washington Supreme Court "has refused to apply this Court's substantive constitutional determination to the parties." J.S. 7. This statement is clearly in error. *National Can* held that *Tyler Pipe* does not apply retroactively. However, *Tyler Pipe* clearly applies to NCC prospectively. After *Tyler Pipe* the State had the choice of foregoing future collection of taxes from NCC or amending its tax laws in response to this Court's decision.[12] In this respect *National Can* is similar to *Lemon II* and *Norris*. All three courts applied the new principles of law prospectively, but refused retroactive relief.

These decisions were not rendered advisory by being applied only prospectively. This is best demonstrated by asking whether this Court would have jurisdiction under Article III if the only issue were the prospective applica-

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[12]As we have previously explained, *supra*., p. 2-3, on August 10, 1987, the Washington legislature met in special session and repealed the multiple activities exemption. Following this Court's lead the legislature replaced the exemption with a system of credits. See Laws 1987, 2nd ex. sess., ch. 3. App. A.

tion of the law, with no refund question involved at all. This Court has found a case or controversy in tax cases under Article III even when the plaintiff was not seeking a tax refund.

In *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977) six regional stock exchanges challenged, on Commerce Clause grounds the New York tax on stock transactions. These exchanges were not subject to the tax and thus were not seeking a refund. Nevertheless, this Court ruled that these exchanges had standing under Article III. 429 U.S. at 320 n.3. In *Nashville, Chattanooga, and St. Louis Railway v. Wallace*, 288 U.S. 249, 263-65 (1932) this Court held that a declaratory judgment action to invalidate a tax constituted a case or controversy under Article III, even though the taxpayer sought no refund. See also *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978) which involved a declaratory judgment action to invalidate a Department of Revenue rule. Again, no refunds were involved. Clearly, there is nothing in Article III that requires this Court to apply its decisions both prospectively and retroactively to the parties before it.

NCC also cites *Griffith v. Kentucky*, 479 U.S. ___, 107 S.Ct. 708 (1987) and *Stovall v. Denno*, 388 U.S. 293 (1967). J.S. 7 and 9. These decisions are not inconsistent with *Lemon II*, *Norris* or *National Can*, because they involve criminal proceedings. Retroactivity in civil proceedings continues to be governed by *Chevron*, 404 U.S. 97 (1971). *Griffith*, 107 S.Ct. at 713 n.8. This difference makes sense in terms of Article III. In a criminal proceeding the party before the court will receive no benefit unless a new rule is applied retroactively and a conviction is invalidated. As we have seen, this is not true in civil proceedings and particularly in a tax case, where a litigant is relieved of future tax liability.

CONCLUSION

For the reasons given above, this appeal should be dismissed or, in the alterntive, the judgment should be affirmed.[13]

DATED THIS 29th DAY OF APRIL, 1988.

Respectfully submitted,

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[13] If NCC's Jurisdictional Statement is considered — as it should be — as a petition for writ of certiorari pursuant to 28 U.S.C. § 2103, NCC's petition should be denied.

APPENDIX A

Wash. Rev. Code § 82.04.440, As Amended By Laws 1987, 2nd ex. sess., ch. 3.

(1) Every person engaged in activities which are within the purview of the provisions of two or more of sections RCW 82.04.230 to 82.04.290, inclusive, shall be taxable under each paragraph applicable to the activities engaged in.

(2) Persons taxable under RCW 82.04.250 or 82.04.270 shall be allowed a credit against those taxes for any (a) manufacturing taxes paid with respect to the manufacturing of products so sold in this state, and/or (b) extracting taxes paid with respect to the extracting of products so sold in this state or ingredients of products so sold in this state. Extracting taxes taken as credit under subsection (3) of this section may also be taken under this subsection, if otherwise allowable under this subsection. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the sale of those products.

(3) Persons taxable under RCW 82.04.250 or 82.04.260 subsection (4) shall be allowed a credit against those taxes for any extracting taxes paid with respect to extracting the ingredients of the products so manufactured in this state. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the manufacturing of those products.

(4) Persons taxable under RCW 82.04.230, 82.04.240, or subsection (2), (3), (4), (5), or (7) of RCW 82.04.260 with respect to extracting or manufacturing products in this state shall be allowed a credit against those taxes for any (i) gross receipts taxes paid to another state with respect to the sales of the products so extacted or manufactured in this state, (ii) manufacturing taxes paid with respect to the manufacturing of products using ingredients so extracted in this state, or (iii) manufacturing taxes

paid with respect to manufacturing activities completed in another state for products so manufactured in this state. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the extraction or manufacturing of those products.

(5) For the purpose of this section:

(a) "Gross receipts tax" means a tax:

(i) "Which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in the determination of which the deductions allowed would not constitute the tax an income tax or value added tax; and

(ii) Which is also not, pursuant to law or custom, separately stated from the sales price.

(b) "State" means (i) the state of Washington, (ii) a state of the United States other than Washington, or any political subdivision of such other state, (iii) the District of Columbia, and (iv) any foreign country or political subdivision thereof.

(c) "Manufacturing tax" means a gross receipts tax imposed on the act or privilege of engaging in business as a manufacturer, and includes (i) the taxes, imposed in RCW 82.04.240 and subsections (2), (3), (4), (5), and (7) of RCW 82.04.260, and (ii) similar gross receipts taxes paid to other states.

(d) "Extracting tax" means a gross receipts tax imposed on the act or privilege of engaging in business as an extractor, and includes the tax imposed in RCW 82.04.230 and similar gross receipts taxes paid to other states.

(e) "Business", "manufacturer", "extractor", and other terms used in this section have the meanings given in RCW 82.04.020 through 82.04.212, notwithstanding the use of those terms in the context of describing taxes imposed by other states. [1987 2nd ex.s. c 3 § 2]

The legislature finds that the invalidation of the multiple activities exemption contained in RCW 82.04.440 by the United States Supreme Court now requires adjustments to the state's business and occupation tax to

achieve consitutional equality between Washington taxpayers who have conducted and will continue to conduct business in interstate and intrastate commerce. It is the intent of this act to preserve the integrity of Washington's business and occupation tax system and impose only that financial burden upon the state necessary to establish parity in taxation between such taxpayers.

Thus, this act extends the system of credits originated in RCW 82.04.440 in 1985 to provide for equal treatment of taxpayers engaging in extracting, manufacturing or selling regardless of the location in which any of such activities occurs. It is further intended that RCW 82.04.440, as amended by section 2 of this act, shall be construed and applied in a manner that will eliminate unconstitutional discrimination between taxpayers and ensure the preservation and collection of revenues from the conduct of multiple activities in which taxpayers in this state may engage. [1987 2nd ex.s. c 3 § 1]

If it is determined by a court of competent jurisdiction, in a judgment not subject to review, that relief is appropriate for any tax reporting periods before August 11, 1987, in respect to RCW 82.04.440 as it existed before August 11, 1987, it is the intent of the legislature that the credits provided in RCW 82.04.440 as amended by section 2 of this act shall be applied to such reporting periods and that relief for such periods be limited to the granting of such credits. [1987 2nd ex.s. c 3 § 3]

If any provision of this act or its application to anay person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected. [1987 2nd ex.s. c 3 § 4]